Supreme Court, U.S.
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No. 93-1380

In The

Supreme Court of the United States

October Term, 1993

A.J. ARAVE, WARDEN,

Petitioner,

vs.

ALBERT RAY BEAM,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I.

Timeliness of the Petition

Respondent Beam argues that the petition is untimely in a manner sufficiently confusing that Petitioner finds it desirable to reply.

Beam asserts that the "Judgment" of the Court of Appeals was issued on September 2, 1993, and that the court thereafter made only "technical amendments" to the judgment. Accordingly, Beam calculates that the ninety day period within which a Petition for a Writ of Certiorari might be filed began to run on September 2, 1993, rather than December 7, 1993. The petition was filed within 90 days of the December 7th date.

The Court of Appeals considered and ruled on a petition for rehearing and suggestion for rehearing *en banc* filed by the state. Notwithstanding the assertion in Beam's brief in opposition that "the Court of appeals *order* of December 7, [sic] 1993, cannot be considered an 'opinion or decision' date," Respondent's brief, p.9, the court's action of this date was its order denying the petition for rehearing and suggestion for rehearing *en banc*. See App. 44. Beam has entirely overlooked the provisions of Rule 13.4 which provides that the time for filing a Petition for a Writ of Certiorari begins to run from the date of the denial of the petition for rehearing.

Beam also argues that an amended petition for rehearing was "faulty" and therefore could not be a basis for the jurisdiction of this court. Beam's misleadingly abbreviated references to filing dates and an amendment

to the petition for rehearing makes it necessary to furnish some additional information. The Warden filed a timely petition for rehearing on September 16, 1993. It was then discovered that the petition and suggestion for rehearing *en banc* had been mailed to different counsel than those presently representing Beam. On September 20, 1993, the state forwarded the petition for rehearing and suggestion for rehearing *en banc* to present counsel. On September 23, 1993, David Skeen, representing Beam in this proceeding, sent a letter to the clerk of the court taking the position that a petition for rehearing is not "filed" until it is "filed" with counsel for the defendant. Understandably, the Court of Appeals was unpersuaded and on September 24, 1993, requested that Beam respond to the petition for rehearing and suggestion for rehearing *en banc*.

Thereafter, on November 16, 1993, Judge Rhinehart amended the court's opinion by adding additional discussion of *Herndon v. Lowry*, 301 U.S. 242 (1937) and several footnotes to the section of the Court's opinion which addressed the question of retroactivity and the effect of *Teague v. Lane*, 489 U.S. 288 (1989). On November 17, 1993, the state mailed an amendment to its petition for rehearing which merely added a brief argument that *Herndon v. Lowry* was not applicable. On December 6, 1993, the Court of Appeals issued its order denying the petition for rehearing and the request for *en banc* consideration. App. 44. The state filed its petition for a writ of certiorari within 90 days after the date the petition for rehearing was denied. That is the governing fact. Rule 13.4, Rules of The Supreme Court of The United States. No amended petition was filed subsequent to December 6, 1993. On

December 7, 1993, the Court of Appeals merely denied the previously filed amended petition as "moot" and suggested that the respondent had "defaulted with respect to its amended petition" on the theory that the *Herndon* discussion related to the court's original opinion, not to its amended opinion, for which reason the court announced that it would hear no additional argument on the case. This is quite plainly not a holding that the state was not entitled to file a petition for rehearing. It has no bearing whatever on the timeliness of the Petition for a Writ of Certiorari.

II.

The State Called On The Court of Appeals to Apply The Presumption of Correctness

Respondent erroneously asserts in his opposition that the state did not raise below the issue that the Court of Appeals improperly intruded upon state court fact finding. Although this issue was not presented to the Court of Appeals in the same terms as in the petition for certiorari, the state asserted in its petition for rehearing and suggestion for rehearing *en banc* that "[t]he court's conclusion rewrites the factual history of the case." (Petition for rehearing, p.3.) The state also argued that "the panel has reevaluated the mitigating and aggravating evidence and concluded that some of it was merely neutral, at best. This action exceeded the review authority of the Court of Appeals. *See Lewis v. Jeffers*, 497 U.S. 746 (1990)."

In short, the state's argument for rehearing included an express reference to the Court of Appeals' failure to defer to the state courts' factual findings.

CONCLUSION

The petition for Certiorari should be granted and this Court should vacate the judgment of the Court of Appeals, either summarily or after hearing.

Respectfully submitted,

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for Petitioner